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91-1503

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF MARYLAND,

Petitioner,

v.

THOMAS E. OTT, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED

1. Whether the collective police knowledge doctrine of Whiteley v. Warden requires exclusion of evidence seized incident to an arrest based upon a police computer record of an open warrant that had been satisfied seven days before the arrest?

2. Whether a non-owner occupant of an automobile may challenge the seizure of drugs from the vehicle as the fruits of the occupant's illegal arrest notwithstanding his failure to establish a reasonable expectation of privacy in the vehicle?

PARTIES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF MARYLAND,

Petitioner,

v.

THOMAS E. OTT, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, Ott v. State, 325 Md. 206, 600 A.2d 111 (1992), affirming the grant of Respondent's motion to suppress, is reproduced in Appendix A (1a-49a).

The reported opinion of the Court of Special Appeals of Maryland, State v. Ott, 85 Md. App. 632, 584 A.2d 1266 (1991), reversing the trial court's grant of Respondent's motion to suppress, is reproduced in Appendix B (50a-84a).

The transcribed opinion of the trial court, granting Respondent's motion to suppress, is reproduced in Appendix C (85a-88a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on January 13, 1992. This petition is filed within 90 days of that judgment as required by Rule

13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The suppression hearing testimony of Corporal James Fogle of the Frederick County, Maryland sheriff's office disclosed the following. At approximately 1:40 a.m. on January 5, 1990, Corporal Fogle observed a car, with two people in

it, sitting in an otherwise deserted shopping mall parking lot. (E. 4-5).[1] Because of vandalism and thefts that had occurred in the parking lot, Corporal Fogle stopped to check the two persons in the car. (E. 5).

Respondent Thomas Ott was seated in the driver's seat; Sandra Sorenson was in the passenger seat. (E. 6). After obtaining identification from Ott and Sorenson, Corporal Fogle ran a computer check to determine whether either was the subject of an outstanding warrant. (E. 6). The check revealed that Ott was wanted for failure to appear in a civil non-payment case. (E. 6). Based on this information, Fogle arrested Ott. (E. 6).

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[1] References to the record herein are to the Joint Record Extract filed in the Court of Appeals of Maryland.

By this time, three other Sheriff's Office deputies had arrived. (E. 7-8). Sorenson, later determined to be the owner of the car, (E. 14), was asked to step outside the car so it could be searched incident to Ott's arrest, (E. 7). As Sorenson was getting out of the car, one of the deputies, Corporal Johnson, noticed a twenty-dollar bill rolled up into a straw. (E. 8). Corporal Fogle seized the bill because in his experience it was something that could be used for the ingestion of controlled dangerous substances. (E. 8). A search of the glove compartment uncovered three bags of a white powdery substance that was recognized to be cocaine. (E. 9, 16). In addition, a small round mirror with white powdery residue on it was found under the passenger seat. (E. 9). Both Ott and

Sorenson were then handcuffed and transported to headquarters. (E. 9).

Later that evening, Corporal Fogle learned that the arrest warrant for Ott had been satisfied on December 29, 1989. (E. 7, 12-13). The warrant already had been served but, as of January 5, 1990, had not been removed from the computer. (E. 7). A printout introduced at the suppression hearing reflected that an active warrant for Ott was in the computer when Corporal Fogle ran the check on January 5. (E. 7).

The State rested at the conclusion of Corporal Fogle's testimony, whereupon Ott's attorney informed the court that he would present no evidence. (E. 19). In arguing why Ott's suppression motion should be denied, the State asserted that Ott lacked standing to object to the search of the car because Sorenson owned

the vehicle. (E. 19-20). Counsel for Ott countered that Ott had standing because he was the person seated behind the wheel of the car, and argued that the evidence should be suppressed because there was no outstanding warrant when Ott was arrested on January 5, 1990. (E. 20-23).

The suppression court granted defense counsel's motion. (86a-87a). The State appealed, and the Court of Special Appeals of Maryland reversed. The court assumed, arguendo, that Ott had standing to challenge the search, (57a), but held that the officer's good faith reliance on the computerized information was sufficient to justify both Ott's arrest and the search of the car incident thereto, (74a-82a).

On certiorari, the Court of Appeals of Maryland reversed the decision of the intermediate appellate court. The Court of Appeals held that application of the

collective police knowledge rule of Whiteley v. Warden[2] invalidated Ott's arrest. The court reasoned that the arresting officer's reliance on the outdated computer information, while in good faith, was nonetheless objectively unreasonable on the facts presented. (26a-34a). The Court of Appeals further held that, because Ott's arrest was unlawful, he had standing to challenge the fruits of the search of the car, even though he did not own the car and the car's owner had been in the car with him. (35a-48a).

Chief Judge Robert C. Murphy dissented. He agreed with the Court of Special Appeals that the arresting officer's conduct was objectively reasonable; that the delay in updating the computer record to reflect satisfaction of

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[2] 401 U.S. 560 (1971).

the warrant did not constitute police misconduct or negligence; that nothing in Whiteley mandated invalidating the arrest and the search; and, finally, that exclusion of the evidence did not "further the ends of the exclusionary rule in any appreciable way." (48a-49a).

REASONS FOR GRANTING THE WRIT

Every day, police officers encounter situations similar to that faced by the officer here. Pursuant to a police computer warrant check, a passenger of a car is arrested because of an outstanding warrant and the car is searched incident to the arrest. Not uncommonly, such a search uncovers drugs, weapons, or other contraband items as, indeed, the search did here. Given the passenger's lack of a legitimate privacy interest in the vehicle

and the reasonableness of the police conduct, a Fourth Amendment challenge should fail.

Nonetheless, the Maryland Court of Appeals wrongly ruled that under Whiteley v. Warden an arrest is unlawful and its fruits must be suppressed if the arrest was made in reliance on a validly issued warrant, which, unbeknown to the arresting officer, had recently been satisfied. Compounding its error, the Maryland Court of Appeals misapplied the fruit of the poisonous tree doctrine. It decided that a mere non-owner occupant of an automobile, regardless of whether he has demonstrated an expectation of privacy, automatically may seek suppression of the fruits of a vehicle search, so long as he asserts that the search derived from his unlawful detention.

Given the frequency of traffic encounters like that presented by this case, the decision of the Maryland court has far-reaching consequences. Not only is this case of great public importance, the two closely related issues it presents have not been addressed by this Court. Left undecided, these questions will continue to generate conflicts among the state and federal courts.

I.

THE COURTS ARE IN CONFLICT ON THE ISSUE WHETHER THE COLLECTIVE POLICE KNOWLEDGE RULE OF WHITELEY v. WARDEN APPLIES TO INVALIDATE AN OTHERWISE REASONABLE ARREST BASED UPON STALE WARRANT INFORMATION.

Twenty-one years ago this Court ruled in Whiteley v. Warden, 401 U.S. 560 (1971), that an arrest based upon a radio bulletin that is unsupported by probable cause cannot be insulated from challenge

merely because the arresting officer is unaware of the absence of probable cause. Id. at 568. More recently, the Court applied the Whiteley doctrine in the context of a Terry[3] stop, where the issue was whether the police had articulable suspicion for the stop. See United States v. Hensley, 469 U.S. 221 (1985). The present case involves an issue related to, but distinct from, Whiteley and Hensley: Is the collective police knowledge doctrine applicable where it is undisputed that probable cause existed for the issuance of a warrant, but the warrant remains in police records for a brief period of time after it has been satisfied?

Courts have taken conflicting approaches to resolving this as yet

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[3] Terry v. Ohio, 392 U.S. 1 (1968).

unaddressed question. Some courts have concluded that the collective police knowledge doctrine of Whiteley applies and that the arrest is illegal. See, e.g., United States v. Mackey, 387 F. Supp. 1121, 1125 (D. Nev. 1975); People v. Ramirez, 34 Cal. 3d 541, 194 Cal. Rptr. 454, 668 P.2d 761, 764-65 (1983); People v. Mitchell, 678 P.2d 990, 993-94 (Colo. 1984); Carter v. State, 18 Md. App. 150, 155-56, 305 A.2d 856 (1973); People v. Jennings, 54 N.Y.2d 518, 446 N.Y.S.2d 229, 232, 430 N.E.2d 1282 (1981); State v. Trenidad, 23 Wash. App. 418, 595 P.2d 957, 958 (1978).

Other courts have refused to apply the Whiteley doctrine where, as here, the warrant once enjoyed unassailable legal existence and the delay in updating the computer information is of short duration. See, e.g., Childress v. United

States, 381 A.2d 614, 616 (D.C. 1977) (four days); Mayberry v. State, 561 So. 2d 1201, 1202 (Fla. App. 1990) ("no showing of excessive and unacceptable delay"); State v. Cross, 164 N.J. Super. 368, 396 A.2d 604, 605-07 (1978) (one month); Commonwealth v. Riley, 284 Pa. Super. 280, 425 A.2d 813, 816 (1981) (four days). See also State v. Somfleth, 8 Or. App. 171, 492 P.2d 808, 811 (1972) (arrest based upon radio broadcast that defendant was AWOL or deserter, later determined to be erroneous, held not to invalidate search incident to arrest).

More recently, courts have applied the good faith exception doctrine of United States v. Leon, 468 U.S. 897 (1984), finding that the exclusionary rule should not be applied absent intentional police misconduct. Such was the rationale of the intermediate appellate court and

the dissenting chief judge of the Maryland high court in this case. Within the past several years, three other courts have ruled to like effect. See United States v. De Leon-Reyna, 930 F.2d 396, 401 (5th Cir. 1991) (en banc) (applying good faith exception to uphold warrantless arrest where officer relied upon mistaken license plate information); United States v. Towne, 870 F.2d 880, 885 (2d Cir.), cert. denied, 490 U.S. 1101 (1989) (reliance on warrant improperly kept in NCIC files upheld on basis of Leon); Durio v. State, 807 S.W.2d 876, 877-78 (Tex. Ct. App. 1991) (applying Leon exception to evidence seized by officers relying upon warrant subsequently determined to have been executed).

Still other courts, however, have ruled that Leon is inapplicable to the present situation. Like the Court of

Appeals majority here, these tribunals have reasoned that arrests resulting from the collective negligence of a police department are not subject to the good faith exception. See, e.g., People v. Ivey, 228 Cal. App. 3d 1423, 279 Cal. Rptr. 554, 557 (1991); People v. Fields, 785 P.2d 611, 613 (Colo. 1990); Albo v. State, 477 So. 2d 1071, 1073-75 (Fla. App. 1985); People v. Mourecek, 208 Ill. App. 3d 87, 566 N.E.2d 841, 845 (1991); State v. Taylor, 468 So. 2d 617, 623 (La. App.), cert. denied, 472 So.2d 918 (La. 1985); State v. Gough, 35 Ohio App. 3d 81, 519 N.E.2d 842, 844-45 (1986).

In addition to the above conflicts, Whiteley itself appears to be in conflict with this Court's recent pronouncements in Maryland v. Garrison, 480 U.S. 79 (1987), and Illinois v. Rodriquez, 110 S. Ct. 2793 (1990). In those cases this Court ruled

that the Fourth Amendment is satisfied where a police officer conducting a search makes a mistake of fact, but nonetheless acts reasonably. Although no lower court has yet expressly relied upon Garrison and Rodriguez in a situation like the one presented here, the Fifth Circuit, sitting en banc, has intimated that mistaken reliance on a police radio broadcast satisfies the reasonableness requirement of the Fourth Amendment. See United States v. De Leon-Reyna, 930 F.2d at 399-401 & n.5.

In the present case, it is undisputed that the officer who arrested Ott acted reasonably. Given the police computer information that a warrant was outstanding (which Ott did nothing to dispel), it would have been most unreasonable had the officer acted otherwise. In light of

Rodriguez and Garrison, there was no Fourth Amendment violation.

A definitive decision by this Court will resolve the aforementioned conflicts. It will necessarily resolve the question of Whiteley's scope, its continued viability, and whether it, or this Court's more recent pronouncements, control this case and others like it.

II.

THE COURTS ARE IN CONFLICT ON THE ISSUE WHETHER A PASSENGER OF AN AUTOMOBILE MUST DEMONSTRATE A LEGITIMATE EXPECTATION OF PRIVACY IN THE VEHICLE IN ORDER TO CHALLENGE THE LAWFULNESS OF ITS SEARCH.

Assuming, arguendo, that Whiteley applies, this case presents a second question worthy of this Court's review: May an occupant of a car, who has demonstrated no reasonable expectation of privacy in it, nonetheless seek suppression of evidence seized therein if

the search that produced the evidence derived from the occupant's unlawful detention? This issue stands at the crossroads of two Fourth Amendment doctrines--that which entitles an accused to suppression of evidence obtained as the fruits of unlawful police conduct, Wong Sun v. United States, 371 U.S. 471 (1963), and that which requires persons who seek to litigate the lawfulness of a Fourth Amendment search and seizure to show first a reasonable expectation of privacy in the place searched, Rakas v. Illinois, 439 U.S. 128 (1978); Rawlings v. Kentucky, 448 U.S. 98 (1980).

In Rakas, this Court decided that a passenger qua passenger of a car could not challenge its search. 439 U.S. at 148-49. Since then, the Court has not addressed the question left open in that case but squarely presented here. There,

unlike here, the petitioners neither challenged the legality of the stop of the automobile nor contended that they had been seized when they were told to get out of the car. Id. at 151 (Powell, J., concurring). In the wake of Rakas, lower courts have grappled with the tension between the fruit of the poisonous tree doctrine of Wong Sun and the reasonable expectation of privacy requirement of Rakas and Rawlings. Not surprisingly, this tension has produced conflicts among the courts.

Representative of the sharply divergent views taken on this question is the recent en banc decision of the Court of Appeals of Virginia in Josephs v. Commonwealth, 10 Va. App. 87, 390 S.E.2d 491 (1990) (en banc). The five-judge majority relied on Rakas to hold that Josephs, a passenger in an automobile that

had been stopped and searched, could not challenge the fruits of the search because she enjoyed no legitimate privacy expectation in the vehicle. 390 S.E.2d at 496. Three of the remaining judges disagreed. Eschewing Rakas, they would have ruled that Josephs could contest the stop--which the dissenters believed was unlawful--and that the fruits of her detention were suppressible under Wong Sun. Id. at 499-502 (Barrow, J., dissenting).

Some courts are in accord with the Josephs majority. These courts take the position, like that urged by the State of Maryland in this case, that a defendant's entitlement to litigate the lawfulness of the search and seizure requires that he first demonstrate a legitimate expectation of privacy in the place searched. See, e.g., State v. Cowen, 104 Idaho 649, 662

P.2d 230, 231 (1983); State v. Ribera, 183 Mont. 1, 597 P.2d 1164, 1168-69 (1979); State v. Cheek, 81 Md. App. 171, 567 A.2d 158, 159-60 (1989), cert. dismissed sub nom. Waters v. State, 319 Md. 483, 573 A.2d 807 (1990); Meeks v. State, 692 S.W.2d 504, 510 (Tex. Crim. App. 1985).

Other courts, including the Court of Appeals here, approach the issue as did the dissenters in Josephs, and hold that a defendant may challenge any search that flows from unlawful police conduct vis-a-vis him, thereby holding, at least implicitly, that the defendant's lack of reasonable expectation of privacy in the place searched is irrelevant. See, e.g., United States v. Hill, 855 F.2d 664, 666 (10th Cir. 1988); United States v. Manbeck, 744 F.2d 360, 380-81 (4th Cir. 1984), cert. denied sub nom. O'Hare v. United States, 469 U.S. 1217 (1985);

United States v. Durant, 730 F.2d 1180, 1182 (8th Cir.), cert. denied, 469 U.S. 843 (1984); United States v. Williams, 589 F.2d 210, 214 (5th Cir. 1979), aff'd, 617 F.2d 1063 (5th Cir. 1980) (en banc); People v. Manke, 181 Ill. App. 3d 374, 537 N.E.2d 13, 15 (1989); State v. Eis, 348 N.W.2d 224, 226 (Iowa 1984); State v. Epperson, 237 Kan. 707, 703 P.2d 761, 770 (1985); People v. Smith, 106 A.D.2d 525, 483 N.Y.S.2d 62, 63 (1984); State v. DeMasi, 419 A.2d 285, 294-95 (R.I. 1980), vacated on other grounds, 452 U.S. 934 (1981).

Indeed, one noted commentator has gone so far as to state: "Where the search of the person or the surrounding area has its only justification as being 'incident

to' the arrest under Chimel v. California,[4] then unquestionably the evidence found in the search must be suppressed if the antecedent arrest was in violation of the Fourth Amendment." 4 W. LaFave, Search and Seizure § 11.4(d) at 408 (2d ed. 1987) (emphasis added). This reasoning, however, confuses the justification for the search with the distinct question of an individual's Fourth Amendment privacy expectation. Here, Ott did have an expectation of privacy in the search of his person, but did not have a similar expectation in the search of Sorenson's car, even though both were justified as incident to Ott's arrest.

Moreover, those courts which find that the fruit of the poisonous tree

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[4] 395 U.S. 752 (1969).

doctrine controls seemingly ignore that Wong Sun was decided at a time when defendants accused of possessory crimes had "automatic standing" to challenge the search that produced the contraband. See Jones v. United States, 362 U.S. 257, 264-65 (1960). This rule, of course, was subsequently disavowed in United States v. Salvucci, 448 U.S. 83, 85 (1980), in favor of the rule that a defendant who has no legitimate privacy expectation in the place searched is not permitted to challenge the search.

The conflict among the courts on this issue makes it, like the first issue, appropriate for the Court's consideration. The Court can provide much needed guidance to the lower courts and law enforcement officials on this important and recurring issue of Fourth Amendment law.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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March 17, 1992

APPENDIX

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APPENDIX A:

Reported opinion of the Court of Appeals of Maryland, Ott v. State, 325 Md. 206, 600 A.2d 111 (1992).....1a

APPENDIX B:

Reported opinion of the Court of Special Appeals of Maryland, State v. Ott, 85 Md. App. 632, 584 A.2d 1266 (1991).....50a

APPENDIX C:

Unreported ruling of the Circuit Court for Frederick County, Maryland, dated August 7, 1990, in State v. Ott, Criminal Trial No. 11,701.....85a

APPENDIX A

THOMAS E. OTT, III

v.

STATE OF MARYLAND.

No. 31, Sept. Term, 1991.

Court of Appeals of Maryland.

January 13, 1992.

Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, McAULIFFE, CHASANOW, KARWACKI and ROBERT M. BELL, JJ.

ROBERT M. BELL, Judge.

This case presents for resolution the questions whether Thomas E. Ott, III, the petitioner, was illegally detained and/or illegally arrested and, if he was, whether

the evidence seized by reason of the detention or arrest should have been suppressed. The latter question requires a determination of petitioner's standing to challenge the seizure of the evidence. The Circuit Court for Frederick County ruled in favor of petitioner, finding that: (1) he had standing by virtue of his occupation of the driver's seat in the automobile; (2) "the officers had [no] probable cause in the first place to go in like they did;" and (3) the search of the car's glove box was not incident to petitioner's arrest "and certainly not for the presence of weapons." The court, therefore, suppressed the evidence and the State appealed.[1]

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[1] The State appeals pursuant to Maryland Code (1974, 1989 Repl. Vol.) § 12-302(c)(3)(i) of the Courts and Judicial (Continued)

The intermediate appellate court reversed. State v. Ott, 85 Md. App. 632, 584 A.2d 1266 (1991). Assuming arguendo that petitioner had standing, the court held that the initial encounter between petitioner and the police did not rise to a Fourth Amendment violation. It further held that the petitioner's arrest, albeit pursuant to an invalid arrest warrant, was effected in good faith. "Thus, the warrantless search of the vehicle was valid as a search incident to a lawful arrest...," 85 Md. App. at 646-47, 584 A.2d at 1273, notwithstanding that the petitioner had been handcuffed and placed

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Proceedings Article. Pursuant to that section, the State may appeal, inter alia, in a case brought under, Art. 27, § 286. In accordance with § 12-302(c)(3)(iv), the charges must be dismissed should this Court affirm the decision of the trial court. Petitioner was charged with possession of cocaine with intent to distribute and related offenses.

outside the automobile before the glove box was searched.

We granted petitioner's petition for writ of certiorari and the State's conditional petition to address the important questions presented. For the reasons hereinafter set forth, we will reverse the judgment of the Court of Special Appeals.

1.

The facts are not in dispute. Consequently, we will adopt the statement of facts as set out in the opinion of the Court of Special Appeals:

> On January 5, 1990, Cpl. Fogle [2] was on routine patrol near the Francis Scott Key Mall in Frederick, Maryland. At about 1:40 a.m., he observed two people sitting in a car in an otherwise deserted public parking lot in that mall. No signs were posted that said "No

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2 The only witness to testify at the suppression hearing was Cpl. Fogle.

trespassing," nor were there any indicating that parking was prohibited after certain hours. In short, no restrictions had been posted at all. Fogle [approached] the car and its occupants because of thefts and acts of vandalism that previously had occurred in the parking lot. When he decided to do so, he saw nothing suspicious occurring in the car or anywhere else nearby.

Fogle asked the two individuals their names and also asked what they were doing there. They identified themselves as Thomas Ott (seated in the driver's seat) and Sandra Sorenson (seated in the passenger's seat), and said that they were just talking. After Fogle obtained identification from each one, he radioed police headquarters to run a computer check to determine whether either of them was the subject of an outstanding warrant. Nothing in Fogle's testimony suggested that Ott's or Sorenson's responses to his initial questions were suspicious in any manner; likewise, Fogle appears to have requested written identification to run a computer check as a matter of routine.

The computer check indicated that an outstanding warrant existed for Ott because of his failure to appear in a civil "non-payment" case. Fogle subsequently arrested Ott on this basis. Fogle then asked Sorenson--the car owner--to step out of the car so that the other officers on the scene

could conduct a search incident to Ott's arrest. As Sorenson exited the car, Cpl. Johnson spied a Twenty-dollar bill rolled up into a straw that fell from her lap. Fogle confiscated the bill as evidence, recognizing that it could be used to ingest controlled dangerous substances. The officers proceeded to search the car. They discovered in the glove compartment three bags of a white powdery substance that Fogle recognized to be cocaine. In addition they found under the passenger seat a small round mirror with a white powdery residue on it. The officers handcuffed Ott and Sorenson, and transported them both to the police station. After Ott signed a waiver of rights form he told Cpl. Smith that he was trying to sell the cocaine to get out of debt.

Cpl. Fogle later determined that, in fact, no outstanding warrant existed for Ott because the bench warrant had been satisfied on December 29, 1989. Another sheriff apparently had served the warrant, but had not removed it from the computer before January 5, 1990. At the suppression hearing, the State introduced a computer printout which showed that there was an active warrant when Cpl. Fogle ran the computer search.

85 Md. App. at 634-35, 584 A.2d at 1267-68.

2.

Petitioner did not present any evidence. He argued, however, that, since the warrant on the basis of which the arrest was made was invalid, he was illegally arrested. Petitioner also contended that he had standing, by virtue of his being seated in the driver's seat of the car.

A.

It is undisputed that petitioner was arrested on the basis of an outstanding arrest warrant which had been satisfied seven days earlier. Thus, unless Cpl. Fogle's subjective good faith reliance on the outdated information supplied by the Frederick County sheriff's computer mandates a different result, petitioner's arrest was illegal. The State argued below, and the Court of Special Appeals agreed, that the good faith exception to

the exclusionary rule applies to the case sub judice. The court reasoned that the policy underlying the exclusionary rule, "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved," United States v. Leon, 468 U.S. 897, 906, 104 S.Ct. 3405, 3412, 82 L.Ed.2d 677, 687 (1984), quoting United States v. Calandra, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561, 571 (1974), and, in particular, "to deter police misconduct", id., 468 U.S. at 917, 104 S.Ct. at 3417, 82 L.Ed.2d at 694, is not furthered by suppressing evidence when, rather than acting in bad faith, the police act in complete good faith. 85 Md. App. at 643-44, 584 A.2d at 1272, citing Leon, 468 U.S. at 919, 104 S.Ct. at 3418, 82 L.Ed.2d

at 696 (citing United States v. Peltier, 422 U.S. 531, 539, 95 S.Ct. 2313, 2318, 45 L.Ed.2d 374, 382 (1975)). As the Peltier Court put it:

> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained by a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

Id. The Court of Special Appeals recognized the applicability of the "collective knowledge/collective ignorance" rule, see Albo v. State, 477 So.2d 1071, 1075 n. 4 (Fla. App. 1985); nevertheless, it was of the view that, because of the relatively small number of days by which the information was outdated, "this is [not] a case of police misconduct or negligence such that we should apply the exclusionary rule." 85 Md. App. at 646, 584 A.2d at 1273. The

court relied upon Commonwealth v. Reilly, 284 Pa. Super. 280, 425 A.2d 813, 816 (1981) and Childress v. United States, 381 A.2d 614 (D.C. App. 1977).

The State argues, in addition, that Maryland v. Garrison, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1979); Illinois v. Rodriguez, 497 U.S. _____, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); and Florida v. Jimeno, 500 U.S. ____, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991) require affirmance of the Court of Special Appeals. It contends that police reliance on warrant information received from its computer was objectively "reasonable conduct under the Fourth Amendment and therefore no Fourth Amendment violation occurred...."

Petitioner concedes that Cpl. Fogle acted in "subjective good faith," i.e. he was not aware that the warrant on the basis of which he made the arrest had been

previously served. Petitioner denies, however, that that fact is dispositive. Applying the "collective knowledge/ collective ignorance" rule, which he too asserts is applicable, he argues that Cpl. Fogle must be charged with knowledge that the warrant had been satisfied prior to petitioner's arrest. That result is required, according to petitioner, because the outdated information came from a computer belonging to the Frederick County Sheriff's Department, the warrant was issued in Frederick County, it had been turned over to the Sheriff's Department for execution, and the warrant had been executed by a member of the Sheriff's Department. From this, the petitioner maintains that the arresting officer did not act objectively reasonably. Moreover, petitioner observes, "the State does not explain why a County Sheriff's department

would reasonably require more than seven days to update its own records."

In Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), a sheriff in one Wyoming county, acting on an informant's tip, obtained a warrant for the arrest of Whiteley and a companion. That fact, along with descriptions of the two men, were broadcast over state-wide police radio. An officer in another Wyoming county, relying on the descriptions, arrested Whiteley and his companion. Evidence uncovered during the search incident to that arrest was used, over objection that he was illegally arrested, to convict Whiteley. The Supreme Court agreed with Whiteley, holding that the warrant, pursuant to which he was arrested, was invalid. It then rejected the argument that, because he was unaware of the factual basis

provided to the magistrate for issuance of the warrant, the arresting officer had probable cause for a warrantless arrest. 401 U.S. at 566, 91 S.Ct. at 1036, 28 L.Ed.2d at 312. In particular, the Court found unpersuasive the argument that the radio bulletin rendered reasonable the assumption that, whoever authorized the bulletin had probable cause to direct the arrest. 401 U.S. at 568, 91 S.Ct. at 1037, 28 L.Ed.2d at 313. It explained:

> We do not, of course, question that the Laramie Police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision by the instigating officer to rely on fellow officers to make the arrest.

Id.

In United States v. Hensley, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985), a case decided after its decision in Leon, the Supreme Court explicated the Whiteley holding. There, the issue was whether a stop, in reliance on a "wanted flier" issued by another police department, of an automobile driven by the accused was valid. Relying on Whiteley, the Court held that it was, so long as the stop was in objective reliance on the "wanted flier" and the police department issuing it collectively possessed reasonable suspicion sufficient to justify it. 469 U.S. at 229-33, 105 S.Ct. at 680-82, 83 L.Ed.2d at 612-15. The Court opined:

> Thus, Whiteley supports the proposition that, when evidence is uncovered during a search incident to an arrest and reliance merely on a flier or bulletin, its admissibility turns on whether the officers who issued the flier possessed probable cause to make the arrest. It does not turn on whether those relying on the

> flier were themselves aware of the specific facts which led their colleagues to seek their assistance. In an era when criminal suspects are increasingly mobile and increasingly likely to flee across jurisdictional boundaries, this rule is a matter of common sense: it minimizes the volume of information concerning suspects that must be transmitted to other jurisdictions and enables police in one jurisdiction to act promptly in reliance on information from another jurisdiction.

469 U.S. at 231, 105 S.Ct. at 681, 83 L.Ed.2d at 613-14. Although Hensley emphasized the reasonableness of a police department's reliance on information possessed by another police department, it also recognized the limitation expressed in Whiteley: if the sending police department does not have the requisite information, the receiving police department's reliance on the sending department is not "insulated from challenge." 469 U.S. at 230-31, 105 S.Ct. at 680-81, 83 L.Ed.2d at 613-14.

In Maryland, probable cause may be based on information within the collective knowledge of the police. Mobley and King v. State, 270 Md. 76, 81, 310 A.2d 803, 807 (1973), cert. denied, 416 U.S. 975, 94 S.Ct. 2003, 40 L.Ed.2d 564 (1974); Hopkins v. State, 239 Md. 517, 520, 211 A.2d 831, 833 (1965); Johnson v. State, 238 Md. 528, 539, 209 A.2d 765, 770 (1965); Mercer v. State, 237 Md. 479, 483, 206 A.2d 797, 800 (1965); Farrow v. State, 233 Md. 526, 531-32, 197 A.2d 434, 436-37 (1963); Carter v. State, 18 Md. App. 150, 154, 305 A.2d 856, 858 (1973). Thus, while an officer may make an arrest on the strength of a warrant, the existence of which has been certified to him by other officers in his department, if the officers who obtained the warrant did not possess sufficient information or evidence to establish probable cause, the arrest based on the

warrant is illegal. In Carter, an automobile, with a specific license tag number, was reported stolen. The police recovered the automobile on the same day it was reported stolen; however, the incident report that had been prepared was not cancelled. Approximately two months later, Carter was a passenger in a car whose license tags were, according to the stolen automobile report, the same as those on the car that previously had been reported stolen. He was arrested, charged with, and convicted of possession and control of narcotics. Applying the collective knowledge rule, the Court of Special Appeals noted that "the police department should have known that [the stolen vehicle report] was erroneous, since police officers had recovered the vehicle and tags originally reported stolen on January 10, 1969." 18 Md. App.

at 154, 305 A.2d at 859. It concluded that, because the information on which the police acted was its own "outdated copy of an erroneous report of a stolen motor vehicle which the police had recovered on the same day it was taken," the arresting officer, a part of the police team, "must be charged with the knowledge that the report was, in effect, rescinded when members of the Baltimore City Police Department recovered the car shortly after it was stolen. Accordingly, the erroneous information transmitted [to the arresting officer] and on the basis of which he arrested the appellant was clearly insufficient to show probable cause." 18 Md. App. at 156, 305 A.2d at 860. This case thus stands for the proposition that "police may not rely upon incorrect or incomplete information when they are at fault in permitting the records to remain

uncorrected." (footnote omitted). LaFave, Search & Seizure, Vol. 2, § 3.5(d), 21-22 (1987).

Cases from other jurisdictions, whether decided before Leon, e.g., United States v. Mackey, 387 F.Supp. 1121, 1125 (D.Nev. 1975); People v. Ramirez, 34 Cal.3d 541, 194 Cal. Rptr. 454, 458, 668 P.2d 761, 764-65 (1983); People v. Mitchell, 678 P.2d 990, 993-94 (Colo. 1984); State v. Trenidad, 23 Wash. App. 418, 595 P.2d 957 (1978), or after Leon, People v. Howard, 162 Cal.App.3d 8, 208 Cal. Rptr. 353 (1984); Albo v. State, 477 So.2d 1071 (Fla. App. 1985); People v. Mourecek, 208 Ill.App.3d 87, 152 Ill. Dec. 964, 968, 566 N.E.2d 841, 845 (1991); People v. Joseph, 128 Ill.App.3d 668, 83 Ill. Dec. 883, 470 N.E.2d 1303 (1984); State v. Taylor, 468 So.2d 617 (La. App.

1985); State v. Gough, 35 Ohio App.3d 81, 519 N.E.2d 842 (1986), are in accord.

Whiteley is not affected by Leon, as Hensley makes clear. In fact, cases that directly address the "good faith" exception in the context of the collective knowledge rule reject the applicability of the good faith exception to the exclusionary rule.

In Joseph, supra, for example, a case similar to that sub judice, after distinguishing the Leon facts from those before it, the court noted the problems evolving "from police reliance on electronically recorded and disseminated criminal files," which are not kept up to date. 83 Ill. Dec. at 886, 470 N.E.2d at 1306. It then opined:

> In the case at bar the arresting officer received computerized information that there was a warrant outstanding against the defendant, and he arrested defendant solely on that

> basis. The warrant, in fact, had been recalled eleven days earlier. During this period of time defendant was subject to arrest through no fault of his own and, only because information had been retained in the system when it was no longer valid. See People v. Jennings, 1981, 54 N.Y.2d 518, 446 N.Y.S.2d 229, 430 N.E.2d 1282 (1982).
>
> In Leon the Supreme Court observed that the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. (468 U.S. [897], 104 S.Ct. 3405, 3419, 82 L.Ed.2d 667). The situation in the instant case reflects a matter within the responsibility and control of police authorities who failed to update their records to accurately reflect defendant's current status. In this age of computerization, we do not believe it would be appropriate to sanction the arrest here, thereby allowing for law enforcement authorities to rely on an error of their own making.... Moreover, it is our opinion that the good-faith reliance of the arresting officer, in acting upon information provided to him through police channels, cannot overcome the intrusion made upon defendant's fourth amendment rights. (some citations omitted).

Id. Taylor, supra, 468 So.2d at 625, relying on Joseph, added:

> It logically follows that once police authorities have actual knowledge of a fact (here the invalidity of the warrant which the . . . Sheriff's Office must be charged with because of the information on file in its records department), all successive officers who dealt with defendant are held to have knowledge of this fact.

See also Albo, supra, 477 So.2d at 1074, in which the court commented:

> Any doubt about the inapplicability of Leon to a case in which the arresting officer, although in individual "good faith," acts in reliance upon objectively incorrect information supplied by other police sources, has been dissipated by the recent, post-Leon decision in United States v. Hensley, 469 U.S. [221], 105 S.Ct. 675, 83 L.Ed.2d 604 (1985).
>
> Hensley directly applied the Whiteley probable cause-arrest rule to a Terry stop effected to investigate a prior crime. It held that a stop based on a flyer or bulletin is permissible when the officers who issued it had a founded suspicion that the designated person had committed an offense. But the court emphasized that just as the police may permissibly act upon their collective knowledge, so they are restrained by their collective ignorance.

Indeed, Leon, itself, supports the proposition that the good faith exception is inapplicable:

> References to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness not only of the officers who eventually executed the warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. See Whiteley v. Warden, 401 U.S. 560, 568, 28 L.Ed.2d 306, 91 S.Ct. 1030 (1971).

468 U.S. at 923 n.24, 104 S.Ct. at 3420 n.24, 82 L.Ed.2d at 698 n.24.

Garrison, Rodriguez, and Jimeno are also inapposite. In none of those cases was the source of the misapprehension of the facts information obtained from another police officer or the result of a police department failure to update its

own records. In Garrison, the search was pursuant to a facially valid search warrant; however, due to the peculiar layout of the subject premises, the officers mistakenly believed that they had authority to search an area not covered by the warrant. That belief was, the Court held, objectively reasonable. 480 U.S. at 80-81, 107 S.Ct. at 1015, 94 L.Ed.2d at 78. The Supreme Court held, in Rodriguez, that it was objectively reasonable for the police to conduct a search in reliance on the consent given by a person who, notwithstanding that it later turned out she did not, appeared to have authority to do so. 497 U.S. at ___, 110 S.Ct. at 2801, 111 L.Ed.2d at 161. Significantly, the consenting person, albeit illegally, possessed a key to the apartment and stated that she lived at the premises, neglecting to add that she had done so

some days before. 497 U.S. at ____, 110 S.Ct. at 2797, 111 L.Ed.2d at 156. Nor is Jimeno supportive of the State's arguments. It stands for the rather unremarkable proposition that, having advised the consenting person as to what is being sought, it is objectively reasonable for the officer to whom consent is given to assume that the consent covers the search of any container in which the evidence sought could logically fit. 500 U.S. at __, 111 S.Ct. at 1804, 114 L.Ed.2d at 303.

In the case sub judice, whether probable cause existed depended upon the accuracy of the outstanding warrant information in the Sheriff Department's computer. Placing accurate and current information into the computer, just as taking inaccurate or outdated information out, is a function performed by personnel

in the Sheriff's Department. Allowing outdated, inaccurate information to remain in the computer, thus, placing citizens at risk of being deprived of liberty, without legal basis, see Joseph, 83 Ill. Dec. at 886, 470 N.E.2d at 1306, therefore, is the fault of the Sheriff's Department.

The arresting officer had no actual knowledge that the warrant on which he arrested petitioner was no longer outstanding. In that sense, then, he acted in subjective good faith. Nevertheless, he was chargeable with knowledge of the warrant's invalidity. Since an officer in the Sheriff's Department had previously served the warrant, that department must have known that it was outdated.

Notwithstanding the applicability of the "collective knowledge/collective ignorance" rule to the circumstances sub

judice, a fact that the Court of Special Appeals specifically acknowledged, 85 Md. App. at 645, 584 A.2d at 1273, and which the State has not expressly denied, the State argues, as the Court of Special Appeals held, that this is not a "case of police misconduct or negligence," implicating the exclusionary rule. Also, like the Court of Special Appeals, it asserts that "it is the amount of time which elapses between the time that the warrant...becomes invalid and the time of the arrest which primarily determines whether probable cause exists for a valid warrant." Ott, 85 Md. App. at 645-46, 584 A.2d at 1243. Thus, the State proffers that "[b]ecause the erroneous information remained in the computer only four days longer than it should have, it is inappropriate to apply the exclusionary rule."

Neither Reilly, nor Childress, the cases upon which the State relies, is persuasive. Both involved arrests based upon warrants that, although previously satisfied, had not been removed from the computerized "active" list. In Reilly, the computer was that of the National Crime Information Center (NCIC), not the Philadelphia Police Department, and the court recognized that there was no indication that the Philadelphia Police were responsible for NCIC's failure to update the information. Reilly, 425 A.2d at 816. Because police may reasonably rely upon an NCIC report of an outstanding arrest warrant and juvenile detainer in making a warrantless arrest, 425 A.2d at 816, the court held that the information subsequently proven wrong and stale by only four days was insufficient to negate the probable cause otherwise provided by

the NCIC report. Id. Without adopting the merits of the distinction drawn by Reilly --that the source of the erroneous information is dispositive, the case sub judice, is nevertheless distinguishable on that basis, i.e., as we have seen, the computer in this case was that of the Sheriff's Department, which, consequently, had the responsibility of updating the information in it.

In Childress, the case upon which Reilly relied, the erroneous information was the result of the District of Columbia Police Department's failure to remove a satisfied warrant from its "active" list. 381 A.2d at 616. Notwithstanding, the court held that "the police officer's good faith reliance on the radio report and the resultant reasonable belief that valid traffic warrants were outstanding provided probable cause to arrest appellant

Childress." Id. Whiteley was not controlling, it asserted, because the warrant in that case "never legally existed". 318 A.2d at 617. It then opined (at 617-18):

> Administrative delays attendant to the operation of any metropolitan area police department resulted in failure to remove the satisfied warrants from the computerized "active" list before the officers received the radio dispatch on November 18 that the warrants were outstanding. This combination of reasonable administrative delay and reasonable police reliance on misinformation produced by such a delay presents a situation in which acceptance of appellants' position would do nothing to advance the purposes of the exclusionary rule. (Footnote omitted)

Apparently as a matter of law, the court concluded that a four day delay, two days of which occurred on the weekend, did not amount to "police administrative negligence." 381 A.2d at 617-18 n.3.

We are not persuaded. The Childress court never addressed the critical

distinctions drawn by Whiteley--whether the department is chargeable with knowledge that the information is outdated and is at fault for not having cleared the computer of the erroneous information. Moreover, it never explained why the delay in that case was reasonable. Furthermore, the conclusion reached by Childress presents an anomalous situation that, for some period of time, a police department's failure to maintain accurate records, without explanation, may lawfully place citizens at risk. We are not prepared to reach such a conclusion without, at the very least, some indication that the department's omission or failure is reasonable.[3]

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[3] The distinction between the case where, although the information in the police department's possession was erroneous, that fact was known, not to a police officer, but, rather, to a third party who (Continued)

The record is devoid of evidence, or, for that matter, any attempt to introduce evidence, tending to establish the amount of time it reasonably would, or should, have taken to clear the computer of executed warrants. The Court of Special Appeals held as a matter of law, reasoning from cases upholding arrests based on similar outdated information, that a "net"

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did not inform the police that the information was erroneous, and the case where the police know or should know that information upon which they rely is erroneous is significant. Carter v. State, 18 Md. App. 150, 154 n.1, 305 A.2d 856, 859 n.1 (1973). Thus, the cases of United States v. De Leon-Reyna, 930 F.2d 396 (5th Cir. 1991) (en banc), in which the good faith exception was applied to uphold a warrantless arrest based on reliance upon mistaken license plate information, and Durio v. State, 807 S.W.2d 876 (Tex.Cr.App. 1991), in which the good faith exception was applied to uphold reliance by police officers upon an invalid warrant which was, however, facially valid, do not support the Court of Special Appeals' decision. In both cases, a third party was the actor, not the police department.

delay of four days[4] in clearing a computer of outdated information is not sufficient to amount to police misconduct or negligence implicating the application of the exclusionary rule. That determination, however, is not one that may be made as a matter of law. The question whether a lapse of time was sufficiently short so that reliance by the police may properly be considered reasonable and in good faith may be a mixed question of law and fact. Moreover, the burden to establish the facts underlying that determination rests with the State. Stackhouse v. State, 298 Md. 203, 217, 468 A.2d 333, 341 (1983) (Burden of proving exigent circumstances is on the

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[4] As previously noted, the total delay was seven days, but two of those days were on a weekend and a third was a holiday.

State); Bouldin v. State, 276 Md. 511, 515, 350 A.2d 130, 133 (1976) (Burden on State to show that lawful arrest occurred prior to search alleged to be incident thereto). And the good faith exception does not serve to excuse the State of that burden. Since the State failed to meet its burden of going forward with evidence as to the amount of time reasonably required to clear the computer of outdated information, not to mention the burden of persuasion on the issue, the trial court properly suppressed the evidence; consequently, the judgment of the Court of Special Appeals must be reversed.[5]

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[5] The determination whether it is reasonable or unreasonable for outdated information to remain in a computer must be made after consideration of the totality of the circumstances. One of the circumstances is whose responsibility it is to keep information in the computer current. We point out that, where the right of citizens to be free from an (Continued)

B.

Notwithstanding the illegality of petitioner's arrest, the State maintains that petitioner lacked standing to challenge the search of his companion's

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illegal arrest is at stake, because infringement upon the rights of the citizenry will not be lightly tolerated, the State's burden is heavy. In that regard, we observe that the dispatch with which a police department acts in putting information into its computer system should serve as a guide as to the dispatch with which it should be required to act in taking information out of the system. The State acknowledged at oral argument that it does not take a lot of time to enter warrant information into a computer, certainly not seven days, or even four days; it should take no longer to remove information from the computer than it takes to put it in. We also wonder whether the occurrence of a weekend or holiday has any real relevance to the question of the reasonableness of a delay in clearing a computer of outdated information. Unlike a business in the private sector, a police department ordinarily is a 24-hour a day, seven days a week and holiday operation. Therefore, strong evidence should be required to justify omitting holidays and weekends in computing the delay.

automobile. It argues, therefore, that the Court of Special Appeals erred in assuming, albeit arguendo, that he did. This argument must proceed on the premise that at issue is the legality of a car search qua car search, see the State's citation to, inter alia, Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), and its reliance upon California v. Acevedo, 500 U.S. ___, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991); New York v. Class, 475 U.S. 106, 112-13, 106 S.Ct. 960, 965, 89 L.Ed.2d 81, 89-90 (1986); South Dakota v. Opperman, 428 U.S. 364, 368, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000, 1005 (1976); Doering v. State, 313 Md. 384, 399, 545 A.2d 1281, 1288 (1988). Thus, it is understandable that the State asserts that petitioner failed to show that he had a legitimate expectation of privacy in the

automobile. See Ricks v. State, 312 Md. 11, 26, 537 A.2d 612, 619, cert. denied, 488 U.S. 832, 109 S.Ct. 90, 102 L.Ed.2d 66 (1988). As to the latter contention, it also says that petitioner did not establish his standing to challenge the search by merely showing that he was seated in the driver's seat; he needed to show, in addition, that he had driven the car or to produce evidence that he had control over, or an expectation of privacy in it.

The search in this case was one incident to arrest, as the Court of Special Appeals held, 85 Md. App. at 647, 584 A.2d at 1274, and the State, in its brief, concedes. Such a search is lawful to the same extent as the arrest pursuant to which it was undertaken; if the arrest is illegal, the search incident to that arrest is also illegal. Trusty v. State,

308 Md. 658, 661 n.2, 521 A.2d 749, 750 n.2 (1987); Stanley v. State, 230 Md. 188, 191, 186 A.2d 478, 481 (1962); Dipasquale v. State, 43 Md. App. 574, 575, 406 A.2d 665, 666 (1979); Dixon v. State, 23 Md. App. 19, 26, 327 A.2d 516, 521 (1974). See also Bouldin v. State, 276 Md. 511, 515, 350 A.2d 130, 132 (1976). In this case, but for petitioner's arrest, the police would have had neither the occasion nor, presumably, any cause to conduct a search of the car--according to the evidence, petitioner and his companion did nothing criminal in the officer's presence. Because it was as a result of official intrusion on petitioner's personal Fourth Amendment right, Rakas v. Illinois, 439 U.S. at 133-34, 99 S.Ct. at 425, 58 L.Ed.2d at 394-95, i.e. his right to be secure from an illegal seizure of his person, that the search was

undertaken, which intrusion has been determined to have been illegal, petitioner must have the right to point out that the search incident to his arrest is, like the arrest, illegal and to move to suppress the fruits of that search.

In Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the Supreme Court made clear that "fruit of the poisonous tree", id. at 488, 83 S.Ct. at 417, 9 L.Ed.2d at 454, "bar[s] from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion." 371 U.S. at 485, 83 S.Ct. at 416, 9 L.Ed.2d at 454. Thus, where contraband is "come at by exploitation of [a primary] illegality," 371 U.S. at 488, 83 S.Ct. at 417, 9 L.Ed.2d at 455, quoting Maguire, Evidence of Guilt, 221 (1959), rather than from a source distinguishable from, and,

therefore, purged of the taint, it must be suppressed and may not be used against the petitioner. Id. The exploitation of a primary illegality does not refer only to an illegal search; it may refer to an unlawful seizure of the person. See, e.g., United States v. Erwin, 875 F.2d 268, 269-70 (10th Cir. 1989), in which the court recognized the distinction to be drawn between "standing to challenge a stop and standing to challenge a search." The court pointed out, citing, inter alia, Wong Sun, 371 U.S. at 484, 83 S.Ct. at 415, 9 L.Ed.2d at 453, that "[e]ven if defendant lacks standing to challenge the search of the car, if the initial stop was illegal, the seized contraband is subject to exclusion under the 'fruit of the poison tree' doctrine." 875 F.2d at 269 n.2.

In United States v. Hill, 855 F.2d 664, 666 (10th Cir. 1988) the court excluded evidence seized incident to an illegal arrest. Other cases and treatise writers have gone even further. E.g. United States v. Durant, 730 F.2d 1180, 1182 (8th Cir. 1984) (recognizing that a passenger in an automobile that is stopped may, on the basis that it was illegal, move to suppress evidence uncovered as a direct result of the stop); United States v. Williams, 589 F.2d 210, 214 (5th Cir. 1979) (same); State v. Haworth, 106 Idaho 405, 679 P.2d 1123, 1123-24 (1984) (same); People v. Manke, 181 Ill.App.3d 374, 130 Ill. Dec. 192, 194, 537 N.E.2d 13, 15 (1989) (same); State v. Eis, 348 N.W.2d 224, 225-27 (Iowa 1974) (same); State v. Epperson, 237 Kan. 707, 703 P.2d 761, 770 (1985); People v. Smith, 106 A.D.2d 525, 483 N.Y.S.2d 62, 63 (1984) (same); State

v. Scott, 59 Or. App. 220, 650 P.2d 985, 987 (1982) (same); State v. DeMasi, 419 A.2d 285, 294-95 (R.I. 1980), vacated on other grounds, 452 U.S. 334, 101 S.Ct. 3072, 69 L.Ed.2d 948 (1981) (same); see also 1 LaFave and Israel, Criminal Procedure § 9.1, 422 (1985), in which it is said:

> that a passenger does not have standing to object to police conduct which intrudes upon his Fourth Amendment protection against unreasonable seizure of his person. If either the stopping of the car or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit.

Setting aside the question whether, under these circumstances, the petitioner had a legitimate expectation of privacy in his companion's car, he clearly has an interest in being free from an illegal seizure of his person, a matter of

legitimate concern. See United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 694-95, 66 L.Ed.2d 621, 628 (1981). As to that, petitioner has a "legitimate expectation that [he] would be free from the unreasonable governmental intrusion occasioned by [his arrest]." DeMasi, 419 A.2d at 294. Hill is illustrative. In that case, the defendants argued that their arrests were unlawful and, therefore, the search conducted incident thereto was also illegal. They also argued that the fruits of a search conducted pursuant to a search warrant issued on the basis of information derived from their illegal arrests should have been suppressed as fruit of the poison tree. 855 F.2d at 666. The court recognized that its determination of those questions turned on the legality of the arrests. Id. Before addressing that

issue, however, it rejected the government's argument that one of the defendants did not have standing to challenge the legality of the search, which was of a houseboat that he did not own. It explained:

> We hold that no showing of a privacy interest is necessary under the facts of this case. The main thrust of Hill's argument is that his warrantless arrest violated the Fourth Amendment and that all evidence obtained as a result of the arrest is therefore tainted and must be suppressed. Hill clearly may challenge the validity of his own arrest. We hold that he may therefore claim that evidence found as a fruit of the arrest should be excluded.

Id. To like effect is Epperson, in which the court recognized that:

> Epperson's right to challenge the search stems not from the fact that he was previously a passenger in the motor vehicle, but because he is a person who was unlawfully stopped and seized, and because the search followed as a consequence thereof.

703 P.2d at 770.[6]

In Rakas, the issue was whether the Fourth Amendment rights of the occupants of an automobile, stopped because it was believed to be the get-away car used in a robbery, who did not assert a proprietary

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[6] A noted commentator has suggested that the "fruit of the poisonous tree" analysis is not always appropriate when a search is conducted "incident" to an arrest:

> When the search of the person or the surrounding area has its only justification as being "incident to" the arrest under Chimel v. California [395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)] then unquestionably the evidence found in the search must be suppressed if the antecedent arrest was in violation of the Fourth Amendment. This is direct rather than derivative evidence, and there is no occasion to be concerned about the limits of the fruit of the poisonous tree doctrine.

4 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 11-4(d), 408 (2nd ed. 1987). Whether, therefore, the evidence is viewed as direct or derivative, it may be challenged because the predicate for its discovery was an illegal arrest.

or possessory interest in the car or its contents, had been violated so that they could object to the search of the car and the seizure of a rifle and shells that the search uncovered. The defendants did not challenge the legality of the stop of the automobile or contend that they had been seized when they were told to get out of the car. See 439 U.S. at 150-51, 99 S.Ct. at 434, 58 L.Ed.2d at 405-06 (Powell, J. concurring). It was under these circumstances that the Supreme Court affirmed the judgment of the Illinois Appellate Court. The Court was of the view that the "question is whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it." 439 U.S. at 140, 99 S.Ct. at 429, 58 L.Ed.2d at 399. It held that, because they made no showing

that "they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers," 439 U.S. at 148, 99 S.Ct. at 433, 58 L.Ed.2d at 404, the defendants' Fourth Amendment rights had not been violated and they could not assert those of the owner of the car or its contents. 439 U.S. at 133-34, 99 S.Ct. at 425, 58 L.Ed.2d at 394-95. Thus, the Court found the issue more appropriately analyzed under the substantive Fourth Amendment right rather than on the basis of traditional notions of standing. 439 U.S. at 140, 99 S.Ct. at 428, 58 L.Ed.2d at 399. See also Scott, 650 P.2d at 987. In that regard, then, the Rakas analysis is consistent with the result we reach here. It is also inapposite since, in the instant case, by virtue of his arrest, the personal Fourth

Amendment rights of the petitioner were infringed. Williams, 589 F.2d at 213-14; Haworth, 679 P.2d at 1124; DeMasi, 419 A.2d at 294.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO FURTHER REMAND THE CASE TO THE CIRCUIT COURT FOR FREDERICK COUNTY FOR DISMISSAL OF THE CHARGES AGAINST PETITIONER.

COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY FREDERICK COUNTY.

MURPHY, C.J., dissents.

MURPHY, Chief Judge, dissenting.

On the facts of this case, giving full sway to the intended reach of the "good faith" exception so clearly articulated in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), I would affirm the judgment for the reasons stated by the Court of Special Appeals. The arresting officer's conduct was objectively reasonable. To exclude

the evidence in this case does not further the ends of the exclusionary rule in any appreciable way. While I share the majority's concern that the police-operated computer should promptly reflect the satisfaction of an outstanding warrant, I do not believe that the delay in this case amounts to such police misconduct or negligence as warrants the result reached by the Court. See e.g., Connelly v. State, 322 Md. 719, 589 A.2d 958 (1991). Nothing in Whiteley v. Warden, upon which the majority places such stress, mandates the reversal of the judgment in this case.

APPENDIX B

STATE OF MARYLAND

v.

THOMAS E. OTT, III.

Court of Special Appeals of Maryland.

January 29, 1991.

Argued before GARRITY, ALPERT and FISCHER, JJ.

ALPERT, Judge.

In this case, the State charged Thomas E. Ott, III (appellee) with possession of a controlled dangerous substance, possession of a controlled dangerous substance with intent to distribute, and possession of drug paraphernalia. After a hearing on Ott's motion to suppress the evidence, the Circuit Court for Frederick County granted

the motion and the State (appellant) appeals to us from that ruling.

FACTS

Corporal James Fogle of the Frederick County Sheriff's Office was the sole witness who testified at the suppression hearing. His testimony established the following facts:

On January 5, 1990, Corporal Fogle was on routine patrol near the Francis Scott Key Mall in Frederick, Maryland. At about 1:40 a.m., he observed two people sitting in a car in an otherwise deserted public parking lot in that mall. No signs were posted that said "No trespassing," nor were there any indicating that parking was prohibited after certain hours. In short, no restrictions had been posted at all. Fogle stopped to check the car and its occupants because of thefts and acts of vandalism that previously had occurred

in the parking lot. When he decided to do so, he saw nothing suspicious occurring in the car or anywhere else nearby.

Fogle asked the two individuals their names and also asked what they were doing there. They identified themselves as Thomas Ott (seated in the driver's seat) and Sandra Sorenson (seated in the passenger's seat), and said that they were just talking. After Fogle obtained identification from each one, he radioed police headquarters to run a computer check to determine whether either of them was the subject of an outstanding warrant. Nothing in Fogle's testimony suggested that Ott's or Sorenson's responses to his initial questions were suspicious in any manner; likewise, Fogle appears to have requested written identification to run a computer check as a matter of routine.

The computer check indicated that an outstanding warrant existed for Ott because of his failure to appear in a civil "non-payment" case. Fogle subsequently arrested Ott on this basis. Fogle then asked Sorenson--the car owner--to step out of the car so that the other officers on the scene could conduct a search incident to Ott's arrest. As Sorenson exited the car, Corporal Johnson spied a twenty-dollar bill rolled up into a straw that fell from her lap. Fogle confiscated the bill as evidence, recognizing that it could be used to ingest controlled dangerous substances. The officers proceeded to search the car. They discovered in the glove compartment three bags of a white powdery substance that Fogle recognized to be cocaine. In addition, they found under the passenger seat a small round mirror

with a white powdery residue on it. The officers handcuffed Ott and Sorenson, and transported them both to the police station. After Ott signed a waiver of rights form, he told Corporal Smith that he was trying to sell the cocaine to get out of debt.

Corporal Fogle later determined that, in fact, no outstanding warrant existed for Ott because the bench warrant had been satisfied on December 29, 1989. Another sheriff apparently had served the warrant, but had not removed it from the computer before January 5, 1990. At the suppression hearing, the State introduced a computer printout which showed that there was an active warrant when Corporal Fogle ran the computer search.

The State rested at the conclusion of Corporal Fogle's testimony; defense counsel announced that he would not

present any evidence, only argument. At that point, the State argued that Ott did not have standing to object to the vehicle search because Sorenson owned the car. Defense counsel countered that Ott indeed had standing because he had been sitting in the driver's seat. Defense counsel also argued that the court should suppress the evidence because no outstanding warrant existed when Fogle arrested Ott on January 5, 1990.

The trial court held that Ott had standing by virtue of "his sitting in the passenger seat of the vehicle at the time that the officers came up." The court further held that the officers had no probable cause "in the first place to go in like they did." Finally, the court held that the officers could not search the glove compartment incident to Ott's arrest "[b]ecause the weapons would

certainly be outside the reach of Mr. Ott who was already handcuffed according to the officers." For these reasons, the court granted Ott's motion to suppress the evidence. On appeal, the State asks us to decide whether the trial court erred when it suppressed the evidence that the officers seized incident to Ott's arrest.

The Search and Seizure

The State contends that the trial court erred when it granted Ott's motion to suppress the evidence. It argues that we should reverse the trial court's decision for any one of the following three reasons: (1) Ott lacked standing to challenge the lawfulness of the vehicle search, (2) Ott's arrest was legal and the search therefore was a valid search incident to a lawful arrest, and (3) even if the arrest technically was improper because no outstanding warrant existed

when Corporal Fogle arrested Ott, the officer acted in good faith so the exclusionary rule should not apply.

Because we shall hold that there was no Fourth Amendment violation, we assume arguendo that Ott had standing to challenge the lawfulness of the vehicle searched and therefore need not address that issue.

A. Initial Encounter

1. Police-Citizen Encounter

The State argues that neither probable cause nor articulable suspicion was required for Corporal Fogle to approach the car and to question the occupants. We agree.

Not every encounter between police officers and citizens engages the protections of the Fourth Amendment. See Terry v. Ohio, 392 U.S. 1, 13, 88 S.Ct. 1868, 1875, 20 L.Ed.2d 889 (1968). These

protections would apply only if a police officer "seized" a citizen during the course of such an encounter. See 3 W. LaFave Search and Seizure § 9.2(h), at 402 (1987) [hereinafter W. LaFave]. "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[1] United States v.

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[1] In 3 W. LaFave, Search and Seizure § 9.2(h), at 410-418 (1987) [hereinafter W. LaFave], LaFave notes that if the "freedom to walk away" test under Mendenhall and Royer is interpreted literally, then almost all encounters between police officers and citizens would be considered Fourth Amendment seizures because the average person would feel compelled to stop and respond. Id. at 410. Instead, LaFave proposes a reinterpretation of the "freedom to walk away" test

> which is grounded in the proposition that police, without having later to justify their conduct by articulating a certain degree of suspicion, should be allowed 'to seek cooperation, even

(Continued)

Mendenhall, 446 U.S. 544, 554, 100 S.Ct.

> where this may involve inconvenience or embarrassment for the citizen, and even though many citizens will defer to this authority of the police because they believe--in some vague way--that they should.' That is, if 'the moral and instinctive pressures to cooperate are in general sound and may be relied on by the police,' then a street encounter does not amount to a fourth amendment seizure merely because of those pressures--that is, merely because the other party to the encounter is known to be a policeman. Rather, the confrontation is a seizure only if the officer adds to those inherent pressures by engaging in conduct significantly beyond that accepted in social intercourse. The critical factor is whether the policeman, even if making inquiries a private citizen would not, has otherwise conducted himself in a manner which would be perceived as a nonoffensive contact if it occurred between two ordinary citizens.

Id. at 410-11 (citations omitted).

LaFave finds this approach useful in cases in which a police officer interacts with an individual seated in a parked car. Id. at 415. Thus, there is no seizure when an officer approaches and questions such persons, uses a generally accepted means such as tapping on the window to get the person's attention, opens the door if the person is asleep, or even requests that the person roll down the window or

(Continued)

1870, 1877, 64 L.Ed.2d 497 (1980); see also Florida v. Royer, 460 U.S. 491, 497-98, 103 S.Ct. 1319, 1323-24, 75 L.Ed.2d 229 (1983). More than mere questioning by a police officer is required to make a reasonable person believe that he or she is not free to leave, and a number of courts have held that no seizure occurred when a police officer approached a parked car to ask the occupants a few questions. See 3 W. LaFave, supra, § 9.2(h), at 408-09 & n.230 (1987 & Supp. 1991).

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open the door. Id. at 415-16 (citations omitted). At the same time, an order to roll down the window or open the door or for the individual to get out of the car can turn the encounter into a seizure for Fourth Amendment purposes. Id. at 416.

LaFave points out that this general approach also explains "why vehicle stops are generally viewed as seizures while pedestrian encounters typically are not...." Id. at 417.

In this case, Corporal Fogle approached the parked car and asked the two occupants who they were and what they were doing. They identified themselves and said that they were "just talking." In our view, this exchange did not constitute a seizure within the meaning of the Fourth Amendment. We think that a reasonable person under these circumstances would have believed that he or she was "free to leave." That is, Officer Fogle did nothing to add to the "moral and instinctive pressures to cooperate" that Ott and Sorenson might have felt by "engaging in conduct significantly beyond that accepted in social intercourse."[2] See 3 W. LaFave,

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[2] There was no evidence in the record to suggest that the officer exerted even subtle pressure on Ott to remain there and to cooperate with the officer's requests. Further, the State at oral (Continued)

supra, § 9.2(h), at 412; see also supra note 1.

2. Identification Request

We further hold that the officer's subsequent request for Ott's identification[3] to run a computer check

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argument acknowledged that Ott could have left at any time had he chosen to do so.

Ott, however, argued in his brief that when the police officer asked him for identification to run a computer check, Ott could not reasonably have believed that he was free to refuse the request or to leave. In our discussion, infra, we find that sections 13-409 and 16-112 of the Transportation Code authorize police officers to request an individual's driver's license and/or vehicle registration card. See infra text pp. 639-643 and notes 4 & 5. In Beckwith v. State, 78 Md. App. 358, 362, 553 A.2d 259 (1989), rev'd on other grounds, 320 Md. 410, 578 A.2d 220 (1990), we agreed that under the circumstances of that case, the officers had no right to demand to see the defendant's driver's license, but we distinguished between a "demand" and a "request." As in Beckwith, there was no evidence of a "demand" in this case.

[3] The record is unclear as to whether the officer used Ott's verbal identification of himself or a document with (Continued)

was reasonable and did not turn the consensual encounter into a seizure under the Fourth Amendment. Maryland cases have

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identification to run the computer check:

> Q Who did you identify them as being?
> A The driver was Mr. Ott, seated with Mr. Stillrich. And the passenger was a Sandra Sorenson.
> Q Alright, did you ask them what they were doing in the parking lot?
> A Yes I did.
> Q And what was the response?
> A They stated they were just talking.
> Q Alright and what did you do then?
> A I ran a computer check, I got identification from both and ran a computer check for wanted on both of them.

In his brief, Ott alleged that Officer Fogle violated Ott's freedom of movement when he "obliged [Ott] to hand over written identification (presumably, his driver's license) so that he could 'run a computer check for wanted' on him...." (emphasis added).

We think it is reasonable to assume for our purposes that Ott produced a document with identification and that it was a driver's license. Because the police later determined that Sorenson owned the car, it is unlikely that Ott would have produced a vehicle registration card to identify himself.

interpreted sections 13-409[4] and 16-112[5] of the Transportation Code to authorize police officers to request an individual's driver's license and/or vehicle registration card. See Byrd v. State, 13 Md. App. 288, 292-93, 283 A.2d 9 (1971); Taylor v. State, 9 Md. App. 402, 405-06, 264 A.2d 870 (1970); see also Beckwith v. State, 78 Md. App. 358, 362 n.4, 553 A.2d 259 (1989), rev'd on other grounds, 320 Md. 410, 578 A.2d 220 (1990).

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[4] Section 13-409(b) provides that "[o]n demand of a police officer who identifies himself as a police officer, an individual who is driving or in control of a vehicle shall display a registration card that refers to the vehicle." Md.Transp.Code Ann. § 13-409(b) (1987).

[5] Section 16-112(c) provides that "[e]ach individual driving a motor vehicle on any highway in this State shall display the license to any uniformed police officer who demands it." Md.Transp.Code Ann. § 16-112(c) (1987).

The facts in the case sub judice are similar to those in Taylor v. State, 9 Md. App. 402, 264 A.2d 870 (1970). In Taylor, a police officer observed two young men sitting in a car, which was parked in front of a bar in a high crime area of the city at 12:15 a.m. Id. at 404, 264 A.2d 870. Knowing that "'it's the younger generation generally observed stealing cars,'" the officer asked James Edward Taylor, who was seated in the driver's seat, for a driver's license and vehicle registration card. Id. The officer took these documents and called the police station to determine whether the vehicle was stolen and whether there were any warrants outstanding on Taylor. Id. There were, as it happened, and the officer arrested Taylor. Id. at 404-05, 264 A.2d 870. After the arrest, the officer observed two brown envelopes on the front

seat. Id. at 405, 264 A.2d 870. He knew from experience that these often were used for narcotics. Id. Examination of these envelopes revealed a "large number of capsules and a leafy substance," later determined to be methadone and marijuana. Id. The trial court admitted the narcotics into evidence over Taylor's objections. Id. Taylor appealed from his conviction of unlawful possession of narcotics, contending--among other things--that the officer had no right to check his driver's license and vehicle registration: his car had been parked at the time and the officer had not observed any illegalities. Id. at 404-05, 264 A.2d 870. Taylor also contended that even if the officer had the authority to request the documents, he should not have detained Taylor after he had displayed them. Id.

In writing for the court, Judge Robert C. Murphy--then Chief Judge of the Court of Special Appeals and now Chief Judge of the Court of Appeals--pointed out that Article 66½, sections 97 and 31[6]

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[6] The language of the statutes in effect when the court decided Taylor is different than that of the current statutes. See supra notes 4 & 5. At that time, Article 66½, section 97 provided that "[o]perating licenses shall at all times be carried by the licensee when operating a motor vehicle upon the highways of this State, and shall be subject to examination upon demand by an uniformed officer of the law...." Md.Ann.Code art. 66½ § 97 (1967).

Section 31 of that article stated that "[e]very such registration card shall be carried at all times in the vehicle to which it refers or shall be carried by the person driving or in control of such vehicle who shall display the same upon demand of any uniformed officer of the law." Md.Ann.Code, art. 66½ § 31 (1967).

We think that the difference in the statutory language is minimal and makes no difference for our purposes in this case.

authorized uniformed officers to request a driver's license and vehicle registration card respectively. Id. at 405-06, 264 A.2d 870. Judge Murphy further noted that "[t]he applicability of the statutes do [sic] not, however, depend upon whether the operator has committed some traffic or other violation of law, nor are they inapplicable simply because the vehicle is parked, rather than in actual operation." Id. at 406, 264 A.2d 870 (citations omitted).

The Taylor court held that the officer, who was in uniform, "had the right to ask [Taylor] for his driver's license and registration card," and that Taylor was not "seized" simply because the officer verified the documents by radioing police headquarters. Id. The court further held that probable cause to make

the arrest arose once the officer learned of the outstanding warrant. Id.

In this case, we already have established that the officer's initial contact with Ott was not a seizure under the Fourth Amendment. Following our decision in Taylor, we hold that the officer's request for Ott's identification--presumably a driver's license--was authorized by section 16-112 of the Transportation Code and was not a seizure under the facts of this case.[7]

In so holding, we are not unmindful of our decision in Goode v. State, 41 Md. App. 623, 398 A.2d 801 (1979). In Goode, we held that the random stop of a single

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[7] We want to make clear that the facts of this case are such that it falls short of a Terry stop as well and that we do not uphold the officer's actions on that basis. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

vehicle for a routine check under sections 16-112 and 13-409 of the Transportation Code constituted an unconstitutional seizure, id. at 628, 398 A.2d 801, unless there was some minimal factual basis ("articulable specific facts") to underpin the stop. Id. at 630-31, 398 A.2d 801. We also overruled "any of our prior decisions to the extent that they ... indicate[d] a sanctioning of the single stop."[8] Id. at 628, 398 A.2d 801. We think, however,

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[8] Among the previous decisions that we overruled were Kraft v. State, 18 Md. App. 169, 305 A.2d 489 (1973); Glover v. State, 14 Md. App. 454, 287 A.2d 333 (1972); and Burkett v. State, 5 Md. App. 211, 245 A.2d 911 (1968). See Goode v. State, 41 Md. App. 623, 628 n.6, 398 A.2d 801 (1979).

that Goode and vehicle stop cases generally[9] are distinguishable from the instant case.

A random stop of a vehicle to check the driver's documents--such as that in Goode--visits a "physical and psychological intrusion" on the vehicle's occupants. Delaware v. Prouse, 440 U.S. 648, 657, 99 S.Ct. 1391, 1398, 59 L.Ed.2d 660 (1979). These vehicle stops "generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a

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[9] But see United States v. Adegbite, 846 F.2d 834, 838 (1988), in which the Second Circuit found that "where the car had barely started in a parking lot, moved only fifteen to twenty yards, and was moved to a halt by DEA agents on foot and in plain clothes," as being more analogous to the cases of pedestrians and parked cars to which the Mendenhall seizure test (the "freedom to walk away" test) is applied. (citations omitted). See supra n. 1.

possibly unsettling show of authority." Id. They interfere with "freedom of movement, are inconvenient, and consume time." Id. Further, they "may create substantial anxiety." Id.

Any intrusion visited upon the occupant of a parked vehicle--such as the one in this case--is minimal by comparison. Here, there was no "unsettling show of authority" by Corporal Fogle, either when he approached the car, asked questions of the occupants, or requested their identification. There was no interference with the occupants' freedom of movement because the vehicle already was parked. Further, the momentary inconvenience and brief time involved for the officer to verify that the parties were who they said they were do not seem unreasonable given the circumstances, i.e., the car was the sole

vehicle in a deserted parking lot at 1:40 a.m. and the officer was aware of previous acts of theft and vandalism that had occurred in the lot. We believe that there is a substantial difference between the random stop of a vehicle to run a "routine" check on a driver's license and vehicle registration card, and a request for identification to verify the same from the occupant of the vehicle parked in a deserted lot in a high crime area at 1:40 a.m. In short, the officer's request for Ott's identification was not a seizure under the Fourth Amendment.

B. Arrest

Once police headquarters informed Corporal Fogle that an outstanding warrant existed for Ott, the officer then had probable cause to make the arrest. Our analysis does not end here, however, because the officer later learned that the

warrant on which he relied to make the arrest had been served by the sheriff the previous week.

1. Good Faith Exception

The State contends that Ott's arrest was legal despite the fact that the warrant already had been served and the police had failed to remove it from their computer files. It argues that Corporal Fogle's good faith reliance on the warrant precludes the application of the exclusionary rule. Thus, we must decide whether the good faith exception to the exclusionary rule applies under the facts of this case.

The exclusionary rule is a "'judicially created remedy'" designed to deter police misconduct. United States v. Leon, 468 U.S. 897, 906, 917, 104 S.Ct. 3405, 3411, 3417, 82 L.Ed.2d 677 (1984) (citation omitted). "'The deterrent

purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. [] If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" Id. at 919, 104 S.Ct. at 3418 (quoting United States v. Peltier, 422 U.S. 531, 539, 542, 95 S.Ct. 2313, 2318, 2320, 45 L.Ed.2d 374 (1975) (emphasis added).

Courts that have addressed the problem of an arrest based on outdated police records focus upon whether the officers' good faith reliance on the

inaccurate records provided probable cause for a valid arrest. In making that determination, these courts primarily have considered the amount of time that elapsed between the time that the warrant or stolen vehicle report became invalid and the time of the arrest. See Annotation, Validity of Arrest Made in Reliance Upon Uncorrected or Outdated Warrant List or Similar Police Records, 45 A.L.R. 4th, at 554 (1986).

In Carter v. State, 18 Md. App. 150, 305 A.2d 856 (1973), we said that probable cause for an arrest did not exist when the officer, in making the arrest, relied on an official police broadcast that was based on erroneous information--an outdated stolen vehicle report. The stolen vehicle report on which the officer relied became invalid on January 10, 1969. On March 10, 1969, the date of the

arrest, the police still had not cancelled or rescinded the outdated report. Thus, the report was active for two months longer than it should have been.

We based our decision in Carter on the "collective knowledge" rule, see Albo v. State, 477 So.2d 1071, 1075 n.4 (Fla.Dist.Ct.App. 1985), that the Supreme Court established in Whiteley v. Warden, 401 U.S. 560, 568, 91 S.Ct. 1031, 1037, 28 L.Ed.2d 306 (1971), i.e., that an individual officer need not have personal knowledge of facts which show probable cause so long as other officers who directed the arrest have such personal knowledge. That rule works both ways: "to validate an arrest when the responsible officers have probable cause and to vitiate it when . . . none objectively

exists.'[10] Albo, 477 So.2d at 1073.

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[10] The Court's decision in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), left the rule unaffected.

> The exception to the exclusionary rule stated in Leon specifically applies to a case in which 'an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.' In that instance, the fact that the magistrate had erroneously found probable cause [did] not result in a suppression of evidence seized under the warrant. The explicitly-stated basis for this holding was the determination that the interest in deterring unlawful police conduct, which is the foundation of the exclusionary rule, is not implicated in such a case. This is because, on the one hand, the situation involves 'no police illegality and thus nothing to deter,' and, on the other, exclusion would have no 'significant deterrent effect on the issuing judge or magistrate' who made the underlying error. Plainly, these considerations have no effect upon a case like Pesci [v. State, 420 So.2d 380 (Fla.3d DCA 1982)] or this one in which no judicial determination was involved and the arrest was based instead wholly upon erroneous information supplied by the law enforcement authorities themselves.

(Continued)

Consequently, we said in Carter that because "the information possessed by the police team was an outdated erroneous report of a stolen motor vehicle which the police had recovered on the same day it was taken, [t]he police team . . . must be charged with the knowledge that the report was, in effect, rescinded when [the police] . . . recovered the car shortly after it was stolen. Accordingly, the erroneous information transmitted to [the officer] and on the basis of which he arrested the appellant was clearly insufficient to show probable cause." Id. [18 Md. App.] at 156, 305 A.2d 856.

We think that the "collective knowledge/collective ignorance" rule, see Albo, 477 So.2d at 1075 n.4, applies in

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Albo v. State, 477 So.2d 1071, 1073 (1985) (citations omitted) (emphasis added).

this case as well. We already have noted that it is the amount of time which elapses between the time that the warrant or stolen vehicle report becomes invalid and the time of the arrest which primarily determines whether probable cause exists for a valid arrest.[11]

In this case, the sheriff actually served the warrant on Ott on Friday, December 29, 1989. The warrant still appeared active in the computer files at the time of Ott's arrest at 1:40 a.m. on January 5, 1990. Corporal Fogle did not learn until that evening (January 5) that the sheriff had served the warrant the

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11. The probable cause determination appears to be a legal fiction. The court, in effect, actually determines whether there was police misconduct--or at least negligence--that might be deterred in the future by the application of the exclusionary rule. 2 W. LaFave § 3.5(d), at 21-22.

week before. In contrast to the stolen vehicle report in Carter, the warrant remained active for seven days beyond the time that the police should have removed it from the computer files. Two of those days, December 30 and 31, were a Saturday and a Sunday; a third day, January 1, was a holiday. We assume that Corporal Fogle learned on January 5 that the warrant no longer was active because someone entered the information into the computer on that day. Thus, the warrant remained in the computer a total of four days longer than it should have.

Based on the facts before us, we do not think that this is a case of police misconduct or negligence such that we should apply the exclusionary rule. Other courts have upheld arrests based on similar outdated information. These courts were "unwilling to invalidate the

arrest simply because '[a]dministrative delays attendant to the operation of any metropolitan police department resulted in failure to remove satisfied warrants from the computer 'active' list before the officers received the radio dispatch . . . that the warrants were outstanding.'" Commonwealth v. Riley, 284 Pa.Super. 280, 425 A.2d 813, 816 (1981) (quoting Childress v. United States, 381 A.2d 614 (D.C.App. 1977). We hold that the officer's good faith reliance on computerized information that was only four days out of date was sufficient to justify Ott's warrantless arrest. Thus, the warrantless search of the vehicle was valid as a search incident to a lawful arrest, and the trial court erred when it granted Ott's motion to suppress the evidence.

2. Scope of Search Incident to an Arrest

In the suppression hearing, the court found that even if the officers had had a valid warrant, i.e., probable cause for Ott's arrest, they exceeded the permissible scope of a search incident to a lawful arrest when they opened the glove compartment. The court reached this conclusion by reasoning that any weapons in the car would have been outside Ott's reach because the officer already had handcuffed him. In its brief, the State contends that "it was proper to search the glove compartment and interior of the car even though Ott was handcuffed and outside of the car."

Once an officer lawfully arrests an individual, the officer is permitted to search, incident to that arrest, the individual's person, the passenger

compartment of the car, and any containers found in the passenger compartment. United States v. Taylor, 857 F.2d 210, 214 (4th Cir. 1988); see also New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). In Belton, the Supreme Court construed the term 'container' to mean "any object capable of holding another object . . . includ[ing] closed or open glove compartments. . . ." Id. 453 U.S. at 461 n.4, 101 S.Ct. at 2864 n.4, 69 L.Ed.2d at 775 n.4. Further, we think that under Belton, an officer may conduct a vehicle search even though the defendant has been removed from the car, handcuffed, and even placed in the police cruiser. See 3 W. LaFave, § 7.1(c), at 15 n.73 (1987 & Supp. 1991).

ORDER GRANTING MOTION TO SUPPRESS REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR FREDERICK COUNTY FOR TRIAL; APPELLEE TO PAY THE COSTS.

APPENDIX C

IN THE CIRCUIT COURT FOR
FREDERICK COUNTY, MARYLAND

Criminal Trial No. 11,701

STATE OF MARYLAND

v.

THOMAS E. OTT, III,

Defendant.

EXCERPT OF TRANSCRIPT OF PROCEEDINGS
(Ruling on Motion to Suppress)

Courthouse
Frederick, Maryland
August 7, 1990

BEFORE:

HONORABLE MARY ANN STEPLER,
Judge

APPEARANCES:

For the State:
SCOTT L. ROLLE, ESQ.

For the Defendant:
FRANKLIN D. STILLRICH, ESQ.

[20] THE COURT: I find that Mr. Ott does have standing by reason of his sitting in the passenger seat of the vehicle at the time that the officers came up. Apparently, there was nothing suspicious that was occurring at the time that the officer noticed their automobile. Mr. Ott was sitting somewhere from as far as what the evidence is, he had a right to be, although the parking lot was essentially deserted and all the stores were closed, the evidence also is that the [21] car was doing nothing suspicious. And apparently there was nothing to preclude him from sitting on that lot. The officers came up to the car uh, asking whom he was, then ran through the computer his name. And found that the computer had an outstanding warrant, told him to step out, placed him under arrest, handcuffed him, told the passenger to step out and then

(inaudible). I don't have that the officers had any probable cause in the first place to go in like they did. Now if one of the officers had said there's Thomas Ott and there's an outstanding warrant for him, I think that the officers could have gone onto the vehicle. But still to reach the glove box even if that situation had occurred I don't think they could have reached the glove box. Certainly not incident to the arrest and certainly not for the presence of weapons. Because the weapons would certainly be outside the reach of Mr. Ott who was already handcuffed according to the officers. So I do not find any probable cause to search. I'm going to grant your Motion Mr. Stillrich. That means the confession's on hold, too.

* * *

[Certificate of Court Reporter omitted in printing]

Form 4 affidavit in forma pauperis

ORIGINAL

Supreme Court, U.S.
FILED
JUN. 12 1992
OFFICE OF THE CLERK

RESPONSE REQUESTED

No. 91-1503

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
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JUN 12 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM, 1991

STATE OF MARYLAND,

Petitioner

v.

THOMAS E. OTT, III,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Thomas E. Ott, III, was charged with a criminal offense in the Circuit Court for Frederick County, Maryland. He was found to meet the qualifications for representation by the Maryland State Office of the Public Defender and was represented by the Office of the Public Defender at trial and on appeal both to the Court of Special Appeals of Maryland and to the Court of Appeals of Maryland. The respondent is not incarcerated at the present time. He resides in Frederick, Maryland, which is about sixty miles away from undersigned counsel's office in Baltimore. Several weeks ago, undersigned counsel sent the respondent an affidavit for him to fill out and sign before a notary, as required by Supreme Court Rules, Rule 39, with the instruction that the respondent was to take care of this matter immediately and return the affidavit to undersigned counsel as soon as possible in the stamped envelope that was provided. To date, undersigned counsel has not received the affidavit. Undersigned counsel is still attempting to get this affidavit

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from the respondent and will file the affidavit in this Court and serve a copy of the affidavit upon the State of Maryland as soon as it arrives.

Respectfully submitted,

Victoria S. Lansburgh
Assistant Public Defender
Appellate Division
201 Saint Paul Place
Baltimore, Maryland 21202
(410) 333-4841

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this **12th** day of **June, 1992,** a copy of the Respondent's Brief in Opposition to Petition for Writ of Certiorari with its accompanying Motion for Leave to Proceed in Forma Pauperis was delivered to Gary E. Bair, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 200 Saint Paul Street, Baltimore, MD 21202.

Victoria S. Lansburgh

No. 91-1503

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF MARYLAND,

Petitioner

v.

THOMAS E. OTT, III,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Stephen E. Harris
Public Defender

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Counsel for Respondent

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QUESTIONS PRESENTED

1. Whether it is consistent with both *Whiteley v. Warden* and the later cases of *United States v. Leon, Maryland v. Garrison* and *Illinois v. Rodriguez* for a state court to hold that the question whether an arrest is reasonable, and hence lawful, where it was made in subjective good faith but on the basis of a police broadcast that was erroneous at the source, depends upon the degree of police negligence or misconduct, if any, at the source.

2. Whether it is consistent with both *Wong Sun v. United States* and *Rakas v. Illinois* for a state court to hold that a person may seek to exclude at his criminal trial evidence obtained by the police as a direct product of the persons's own illegal arrest, even if it should happen that the evidence was seized in a car in which the person did not necessarily have a possessory or privacy interest.

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No. 91-1503

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF MARYLAND,

Petitioner

v.

THOMAS E. OTT, III,

Respondent

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Ott's arrest was made by Corporal James Fogle of the Frederick County, Maryland Sheriff's Department on the basis of a broadcast that Fogle received from that same sheriff's department that an outstanding warrant for Ott's arrest was on file in that same sheriff's department in connection with a Frederick County charge. There was no dispute below that the information as to the existence of this warrant was out-of-date at the time of the arrest because the warrant had been "satisfied" seven days earlier. At the suppression hearing, Corporal Fogle was not able to explain why the information as to the Frederick County warrant had not been

removed from his department's files, and the State of Maryland offered no other evidence to explain why the information had not been removed or why the Frederick County Sheriff's Department reasonably would require seven days or more to update its own records. There was further no dispute at the suppression hearing that at the time Fogle received the broadcast regarding the "outstanding warrant," on the strength of which Fogle arrested Ott and searched the car, Fogle had no reason to believe either that Ott or Ott's companion had committed, were in the process of committing, or were about to commit, any crime, or that the car in which Ott was sitting contained the fruits or instrumentalities of any crime. There was no dispute as well that neither Ott nor Ott's companion gave consent to search the car and that no other independent basis existed for searching the car. The search of the car followed immediately on the heels of Ott's arrest and the sole justification for the search that was given at the suppression hearing was that the search was incident to Ott's arrest and thus proper under *Chimel v. California*, 395 U.S. 752 (1969).

SUMMARY OF ARGUMENTS

I. There is no true conflict among the state and lower federal courts on the point whether the reasonableness of police conduct as a whole must be looked at in determining whether an arrest was reasonable where it was made in subjective good faith but on the basis of an erroneous police broadcast. The Court of Appeals of Maryland has determined in the instant case that the arrest was not reasonable because the State of Maryland failed to offer any proof or argument to explain why the Frederick County Sheriff's Department reasonably would require seven days or more to update its own records. The Court of Appeals of Maryland is entitled to place the burden of proof on the State to justify the reasonableness of an arrest under these circumstances.

II. There is no true conflict among the state and lower federal courts on the

point whether a person may seek to exclude at his criminal trial evidence seized by the police as a direct product of the person's own illegal arrest even though that evidence might have been seized in a place where the person did not have a possessory or privacy interest. The argument made by the State of Maryland that only one standard (whether the person has a possessory or privacy interest in the place searched) governs the question of who has "standing" to contest the seizure of evidence, no matter what the circumstances, is not supported by the cases cited by the State of Maryland for this proposition.

ARGUMENTS

I

The first issue in the petition for writ of certiorari filed by the State of Maryland in this case involves the question to what extent, in any, the legality of an arrest is affected by the fact that the arrest was based on a police dispatcher's transmission that an outstanding arrest warrant existed where the warrant was out-of-date and the information as to the existence of the warrant was erroneously retained in the police department's files. The approach taken by the Court of Appeals of Maryland to the analysis of this question is essentially consistent with the approach taken by most courts that have examined the question, consistent with the approach taken by legal scholars, and consistent with the underlying philosophy of *United States v. Leon*, 468 U.S. 897 (1984). In a nutshell, that approach is this: In considering the reasonableness of an arrest based on information transmitted by one law enforcement agent to another, one must consider the reasonableness of the police action *in toto*. Where stale information regarding the existence of an outstanding warrant is erroneously retained in police files and then passed along to an officer who makes an arrest on the strength of it, in considering whether the arrest was reasonable or not it is necessary to determine the degree of police

negligence (if any) at the source. If there appears to be no police negligence at the source, and the arrest is made in subjective good faith, the arrest (and any resulting search) will be upheld. *See Childress v. United States*, 381 A.2d 614, 617-18 and n.3 (D.C. App. 1977) (delay of four days, two of which were weekend days, in updating records was not unreasonable for a busy metropolitan police department); *Commonwealth v. Riley*, 284 Pa. Super. 280, 287-88, 425 A.2d 813, 816 (Philadelphia police, who relied on information received from the National Crime Information Center ["NCIC"] that was stale by "only four days," "were [not] responsible for the failure of the NCIC to have updated information.")[1] On the other hand, where the circumstances do indicate police (or other law enforcement) negligence at the source, the arrest will not be upheld. *See United States v. Mackey*, 387 F.Supp. 1121, 1124 (D. Nev. 1975) (where arrest was based on information received from the NCIC that was stale by five months, court found that "a computer inaccuracy *of this nature and duration*, even if unintended, amounted to a capricious disregard for the rights of the defendant as a citizen of the United States") (emphasis added.)[2]

In the instant case, the Court of Appeals of Maryland by no means foreclosed the possibility that it would ever find reasonable an arrest made in subjective good

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[1]*See* W. LaFave, 2 *Search and Seizure* §3.5(d) (2d ed. 1987) at 23, where the author observes: "Courts are perhaps understandably not inclined to infer police misconduct when the records lack currency by just a few days."

[2]As the author also observes in LaFave, *supra* at 20, n.71 (emphasis in original), it is necessary to contrast the *Mackey*-type situation, "in which there is a *false* conclusory statement, e.g., that there is an arrest warrant outstanding," with a situation such as that involved in, e.g., *United States v. Hairston*, 763 F.2d 233 (7th Cir. 1985), where "the records *are* accurate, albeit not sufficiently communicative of the underlying facts." The case of *United States v. DeLeon-Reyna*, 930 F.2d 936 (5th Cir. 1991), cited by the State of Maryland at p.15 of its petition for writ of certiorari, essentially falls into the latter category. (There, after observing a suspicious vehicle, the stopping officer transmitted the license number "WM 1438," which the dispatcher mistakenly understood as "WN1438." Certain events then occurred as a result of this mistake. Looking at the totality of the circumstances, the court held that the conduct of the stopping officer was "objectively" reasonable. The stopping officer's failure to use his unit's "code-word" policy in calling in the license plate number was held not to be such negligence as should result in a finding that the officer's subsequent conduct in investigating the vehicle further was improper.)

faith but on the strength of outdated information erroneously retained in police files. The court stated: "The determination whether it is reasonable or unreasonable for outdated information to remain in a computer must be made after consideration of the totality of the circumstances." *State v. Ott*, 325 Md. 206, 223, 600 A.2d 111, 119, n.5 (1992) (State's Appendix at 34a.) The court observed, however, that in *this* case, "The record is devoid of evidence, or, for that matter, any attempt to introduce evidence, tending to establish the amount of time it reasonably would, or should, have taken to clear the computer of executed warrants." 325 Md. at 222, 600 A.2d at 119 (State's Appendix at 32a.) Thus, the court held:

> Since the State failed to meet its burden of going forward with evidence as to the amount of time reasonably required to clear the computer of outdated information, not to mention the burden of persuasion on the issue, the trial court properly suppressed the evidence... .

325 Md. at 223, 600 A.2d at 119 (State's Appendix at 34a.)

The legal theory of the State of Maryland in this case appears to be that whenever a police officer makes an arrest in subjective good faith, the arrest and any ensuing search should always be upheld, no matter how egregious any police negligence or misconduct at the source might have been. Patently, *United States v. Leon* stands for no such proposition, *see Id.* at 923, n.4, nor do the cases of *Maryland v. Garrison*, 480 U.S. 79 (1987) or *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (neither case involving police negligence or misconduct of any sort.)[3] Without running afoul of *Leon*, *Garrison* or *Rodriguez* in any way, the Court of Appeals of Maryland has simply held that, as a matter of state law, when it is

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[3]In *Garrison*, police officers executing a proper warrant mistakenly but reasonably believed that the warrant conferred authority on them to search a place not actually covered by the warrant, and in *Rodriguez*, police officers mistakenly but reasonably believed that a person who took them into Rodriguez's apartment for the purpose of searching it had the authority to allow the search. Neither of these cases is in conflict with *Whiteley v. Warden*, 401 U.S. 560 (1971), which concerns the question of unreasonable police conduct leading to an arrest and search (i.e., information, bad at the source, passed from one police officer to another.)

conceded that an arrest was made on the strength of a warrant that was not valid at the time the arrest occurred, the State bears the burden of proving that the police *in toto* acted reasonably before the arrest and any ensuing search may be upheld. 325 Md. at 221-23, 600 A.2d at 118-19 (State's Appendix at 30a-34a.) The Court of Appeals of Maryland is entitled to make that determination for the citizens of the State of Maryland. To the extent that the opinion of the Court of Appeals of Maryland "conflicts" with any opinion of another court where the same sorts of facts were involved, it is only in the Maryland Court of Appeals's refusal to hold as a matter of law that there is some minimum amount of time that outdated information may remain in police files where lack of negligence *per se* will be found.[4] *See* 325 Md. at 221-22, 600 A.2d at 118 (State's Appendix at 30a-31a.) That provides no good reason for this Court to review the Maryland Court of Appeals's opinion in this case.

II

The State of Maryland contends here that although the arresting officer's sole basis for ordering both Ott and Ott's companion out of the car and then searching the car was Ott's arrest, Ott may not complain of the seizures that followed, even though his arrest prompted the search that led to the seizures and the search could not have been justified under any other theory. Contrary to the assertion of the State of Maryland, there are no "sharply divergent views taken" on the question whether a person in a motor vehicle has "standing" to challenge seizures that are the direct product of his own illegal arrest. (State's petition at 20.) In fact, as the Court of

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[4]The cases cited by the State of Maryland in support of its assertion that other courts have held that "the exclusionary rule should not be applied absent intentional police misconduct" (State's petition at 14-15) are all inapposite. Unlike here, none of these cases involves an arrest: (1) made entirely on the strength of a "conclusory" transmission regarding the existence of an outstanding warrant; (2) where there was no dispute that the warrant in fact was outdated at the time of the transmission; and (3) where the police department transmitting the information reasonably should have known that the warrant was outdated.

Appeals of Maryland recognized, courts around the country, federal and state alike, hold almost uniformly that the question whether an occupant of a motor vehicle has "standing" to contest a seizure of some item within that vehicle, where the claim is that the seizure was the direct product of some unlawful police action taken against him, is an entirely different question from the question whether an occupant of a motor vehicle has "standing" to contest a search of that vehicle, where the claim is that the search unlawfully took place in an area in which that person had a possessory or privacy interest. 325 Md. at 224-27, 600 A.2d at 120-21 (State's Appendix 37a-45a.) The sprinkling of cases that the State of Maryland cites for the "opposite" view are all inapposite.

The State of Maryland places most reliance upon the case of *Josephs v. Commonwealth*, 10 Va. App. 87, 390 S.E.2d 491 (1990), which, it says, is "[r]epresentative" of the view taken by courts which hold that only one standard (that of whether the person has a possessory or privacy interest in the place searched) governs the question whether the occupant of a motor vehicle has "standing" to challenge seizures of evidence inside the vehicle (State's petition at 20.) *Josephs* involved a complaint made by a passenger in a stolen vehicle that a search of that vehicle was unlawful. The Virginia court distinguished the cases relied upon by Josephs in support of her claim that she had "standing," such as *State v. Haworth*, 106 Idaho 405, 679 P.2d 1123 (1984), *State v. Eis*, 348 N.W.2d 224 (Iowa 1974) and *State v. DeMasi*, 419 A.2d 285 (R.I. 1980), vacated on other grounds, 452 U.S. 334 (1981),[5] on the basis that "[n]o stolen vehicle was involved" in those cases. 390 S.E.2d at 495. Without rejecting Josephs's general theory that a passenger in an automobile may challenge seizures that are a direct product of illegal police conduct against him, the Virginia court nevertheless declined, as a matter of policy, to apply

[5]These cases also are among those relied on by the Court of Appeals of Maryland in the instant case.

that theory to the benefit of Josephs. 390 S.E.2d at 495-97. "No valuable social purpose could conceivably be served by extending the protection of the Fourth Amendment to a thief in the enjoyment of a stolen automobile," the court said. 390 S.E.2d at 497. In each of the remaining out-of-state cases relied on by the State of Maryland (State's petition at 21-2), there was an independent basis for searching the vehicle in question (the owner or driver's consent.) Thus, whether the passenger had the right to contest any seizures that occurred on the basis that they were the direct product of illegal police action against him was essentially a non-issue in those cases.

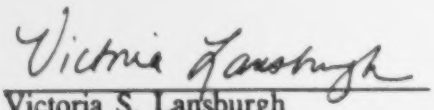
In sum, there is no true "conflict" among the courts on the question whether a person who was a passenger in a motor vehicle may sometimes and under some circumstances assert that an item of evidence recovered from that vehicle may not be used against him at his criminal trial, even though the passenger had no possessory or privacy interest in the vehicle. What the State of Maryland is seeking to have this Court do is to overrule the exclusionary rule of *Wong Sun v. United States*, 371 U.S. 471 (1963). This Court has never given any indication that *Wong Sun* is no longer good law or that some sort of "automobile exception" to the rule of *Wong Sun* exists.[6]

[6]In *Rakas v. Illinois*, 439 U.S. 128 (1978), this Court made a point of noting that the petitioners had mounted a challenge only to the search of the car, and had claimed "standing" only on the grounds that they were "legitimately on the premises" when the search took place. This Court never even hinted that if the petitioners had claimed that an unlawful interference with their persons had occurred and been able to show that the seizure of the evidence was a direct product of that interference, the petitioners would still have had to show that they had a possessory or privacy interest in the car.

CONCLUSION

The petition for writ of certiorari filed by the State of Maryland should be denied, as the State of Maryland has failed to demonstrate that review of the opinion of the Court of Appeals of Maryland is necessary or desirable.

Respectfully submitted,



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